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No. 94-525

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

CHARLES C. SMITH, JR., M.D., et al., - Petitioners

versus

COMMONWEALTH OF KENTUCKY
REVENUE CABINET, et al., - - Respondents

On Petition For Writ Of Certiorari
To The Supreme Court Of Kentucky

PETITION FOR A WRIT OF CERTIORARI

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69 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether the appointment of three special justices to the Supreme Court of Kentucky by the Governor of Kentucky to hear and decide the constitutionality of Kentucky's 2% gross revenue tax on physicians, for which the Governor had strong personal and political interests, violated the Due Process Clause of the Fourteenth Amendment.

II. Whether Kentucky's 2% gross revenue tax on physicians, which is used to fund Kentucky's Medicaid program, violates the Equal Protection Clause of the Fourteenth Amendment since physicians neither caused the social condition being addressed by Medicaid nor are physicians beneficiaries of the Medicaid program.

III. Whether the Opinion of the Supreme Court of Kentucky upholding the classification of physicians for purposes of a 2% gross revenues tax misconstrued the 1991 federal amendment to the Medicaid Act in holding that the amendment compelled the classification when the Amendment by its terms, and as specifically construed by the Health Care Financing Administration, does not sanction any such classification.

PARTIES TO THE PROCEEDINGS IN THE SUPREME COURT OF KENTUCKY

A. *Plaintiffs/Appellees below**

Charles C. Smith, Jr., M.D.
Fred L. Barnett, M.D.
William B. Monnig, M.D.
Kentucky Medical Association
Stuart G. Yoeman, M.D.
Tim Hulsey, M.D.
Joe Davis, M.D.,
President, Warren County Medical Society
Joseph Janes

B. *Defendants/Appellants below*

Commonwealth of Kentucky, Revenue Cabinet

Hon. Kim Burse, not individually but in her capacity as Secretary, Kentucky Revenue Cabinet

Commonwealth of Kentucky, Cabinet for Human Resources

Hon. Masten Childers, II, as successor to Fontaine Banks, Jr., not individually but in his capacity as Secretary, Kentucky Cabinet for Human Resources

Kentucky Health Care Data Commission

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*The Petitioners in this Petition are Charles C. Smith, Jr., M.D.; Fred L. Barnett, M.D.; William B. Monnig, M.D.; and The Kentucky Medical Association. The remaining Plaintiffs/Appellees also challenged The Kentucky Provider Tax, and their case was consolidated with the case at bar (for purposes of briefing and oral argument) in the Kentucky Courts. The Plaintiffs/Appellees also filed a Petition for Writ of Certiorari. The respondents in this Petition are the same as the Defendants/Appellants below.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

The Petitioners, Charles C. Smith, Jr., M.D., Fred L. Barnett, M.D., William B. Monnig, M.D., and the Kentucky Medical Association, respectfully petition for a writ of certiorari to review the opinion of the Kentucky Supreme Court in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Kentucky is reported at 875 S.W.2d 873 (Ky. 1994) (Appendix A). The opinion of the Franklin County Circuit Court is not reported (Appendix B).

JURISDICTION

The date of the opinion of the Supreme Court of Kentucky is March 24, 1994 (Appendix A). The date of denial of a timely petition for rehearing was June 23, 1994 (Appendix C). The statutory provision which confers jurisdiction on this Court is 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent part of House Bill No. 1 from the 1993 Second Extraordinary Session of the General Assembly of the Commonwealth of Kentucky, codified in section 142.207(1) of the Kentucky Revised Statutes (1993), provides:

> A tax is hereby imposed on the gross revenues received on or after July 1, 1993, for the provision of . . . physicians services . . . at a rate of two percent (2%) of the gross revenues received . . . for the provision of health care items or services . . . .

The pertinent parts of the Medicaid Voluntary Contribution and Provider Specific Tax Amendments of 1991, Pub. L. No. 102-234, 105 Stat. 1793, codified as amended at 42 U.S.C. §§ 1396a and 1396b (1994), provides:

> Notwithstanding the previous provisions of this section, for purposes of determining the amount to be paid to a State . . . for quarters in any fiscal year, the total amount expended during such fiscal year as medical assistance under the State plan . . . shall be reduced by the sum of any revenues received by the State . . . during the fiscal year —
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> * * *
>
> from health care related taxes . . . other than broad-based health care related taxes . . .
>
> from a broad-based health care related tax, if there is in effect a hold harmless provision . . . .
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> * * *
>
> In this subsection, the term "broad-based health care related tax" means a health care related tax which is imposed with respect to a class of health care items or services . . . and which . . .
>
> is imposed at least with respect to all items or services in the class . . . and is imposed uniformly . . . .

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides: "No state shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides: "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The Petitioners in this case are comprised of four (4) physicians and the Kentucky Medical Association, Inc. ("KMA"). The physicians are licensed to practice medicine in the Commonwealth of Kentucky where they perform medical services for fees. All but one of the physicians participate in the state Medicaid system. The remaining physician does not participate in the state Medicaid system, but does accept indigent patients as a regular part of his practice. Under the Medicaid system, state and federal funds are used to help provide medical care for indigent Kentuckians. For every dollar of state expenditures, Kentucky Medicaid receives federal matching funds (called Federal Financial Participation, or FFP) under 42 U.S.C. § 1396 *et seq.* in the amount of approximately $2.50.

The KMA is a non-profit Kentucky corporation representing approximately 4,000 physicians practicing medicine in Kentucky, many of whom accept Medicaid patients as a regular component of their medical practice, some of whom do not. Included among KMA's corporate objectives is statewide education about medicine and the enactment and enforcement of just medical laws.

In 1990, the Kentucky General Assembly enacted a tax on physicians' Medicaid receipts for the purposes of receiv-

ing corresponding federal matching Medicaid funds. *See* KRS 205.575. Once the federal funds were obtained, Kentucky's law required the physician tax to be returned to the physicians. This had the effect of increasing the level of federal matching funds without the state actually expending corresponding state funds.[1] In response, on December 12, 1991, the United States Congress enacted the Medicaid Voluntary Contribution and Provider Specific Tax Amendments of 1991, Pub. L. 102-234, 105 Stat. 1793 (codified as amended at 42 U.S.C. 1396a & 1396b (1994)) (hereinafter the "1991 Amendment"). The 1991 Amendment potentially restricted the amount of federal contributions state Medicaid programs would receive *to the extent such programs were funded by health care related taxes.* Under the 1991 Amendment, the amount of state expenditures the federal government would recognize for purposes of determining the corresponding level of federal contributions would be reduced by the amount of any "impermissible" health care related tax. A tax was declared to be "health care related" if it met any of the following four criteria: (1) The tax was imposed on the provision of, or the authority to provide, health care services; (2) The tax was imposed on the payment for health care services; (3) The tax was "related" to health care items or services[2]; or (4) The tax discriminated against health care items or ser-

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[1]Kentucky was but one of a number of states to employ this scheme.

[2] A tax is "related" to health care items or services if at least 85 percent of the burden of such tax falls on health care providers. For example, a tax which is imposed at equal rates on gross revenues of physicians and attorneys is a health care-related tax if 85 percent or more of the total tax burden falls on physicians.

vices.[3] 105 Stat. 1793 (1991). *A state tax which did not meet any of the above criteria was not a health care related tax; accordingly, no reduction in federal contributions would occur as a result of the state's receipt of the associated tax revenues.*

If determined to be "health care" related, a state tax was required to meet three additional standards in order to avoid a reduction in federal contributions: (1) The tax must be broad-based — i.e., applied to all health care items and services within a class of health care items and services specified in the Act, (2) The tax must be uniformly imposed — i.e., applied using an equal rate or amount to each health care item or service within the class of health care items or services taxed, and (3) The tax cannot hold taxpayers harmless for their tax costs. Any health care related tax which failed to meet any of the three criteria was an impermissible tax, the revenues from which would be subtracted from the state's Medicaid expenditures qualified to receive corresponding federal contributions. *Id.*

The 1990 Kentucky tax on physicians' Medicaid receipts, and corresponding refund, violated all three of the criteria found in the 1991 Amendment — and thus, unless amended, Kentucky's Medicaid expenditures qualifying for federal matching funds would be reduced by the amount of the state tax revenue.

Solely in response to the 1991 Amendment, on May 27, 1993 the Second Extraordinary Session of the 1993 Kentucky General Assembly enacted House Bill 1, the so-called

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[3]A tax is discriminatory if, although not limited to health care providers, the tax treatment of health care providers is different from the tax treatment of other entities subject to the tax. For example, if a tax is imposed on physicians and attorneys, but the tax rate imposed on physicians is greater, the tax on physician services is considered to be a separate health care related tax.

"provider" tax. *See* KRS 142.201-259.[4] House Bill 1 imposed taxes on three separate segments of the health care industry: (1) hospitals, (2) health care providers other than hospitals[5], and (3) pharmacies and others dispensing prescription drugs.

Section 2 of House Bill 1 imposed a tax on "all hospitals providing health care items or services or hospital services at a rate of two and one-half percent (2.5%) of the gross revenues received on or after July 1, 1993, for the provision of health care items or services or hospital services." *See* KRS 142.203. Section 1(5) of House Bill 1 defined "hospital services" as all inpatient and outpatient services provided by a hospital, excluding the dispensing of prescription drugs on an outpatient basis by separately licensed hospital pharmacies. *See* KRS 142.201(5).

Section 3 of House Bill 1 imposed a two percent (2%) tax on the gross revenues of health care providers (other than hospitals) for the provision of physicians services, home health care services, health maintenance organization services, and the provision of any other specific health care items or services that federal legislation or regulation permits the state to tax. *See* KRS 142.207. *The tax was imposed on total gross receipts of every Kentucky physician, regardless of whether the physician had elected to participate in the State Medicaid program.*

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[4]House Bill 1 expired by its own terms on July 15, 1994. However, the 1994 Regular Session of the Kentucky General Assembly enacted House Bill 250 which contains a "provider" tax fundamentally identical to the tax in House Bill 1.

[5]KRS 142.201(9) defined "provider" as any individual or entity providing health care items or services or hospital services against which the state is permitted to impose a provider tax pursuant to federal legislation or regulation, excluding facilities operated by the federal government, and excluding any class of provider that includes provider groups that are prohibited by state law from participating in the state medicaid program.

Section 4 of House Bill 1 imposed a tax on pharmacies and all other providers (including physicians) dispensing outpatient prescription drugs at a rate of $0.25 per prescription upon outpatient prescription drugs for which delivery was taken in Kentucky on or after July 1, 1993. Section 4(1)(a) permitted pharmacies to pass the tax on to insurers or other health organizations with whom the pharmacies had entered into contracts for the provision of health care items or services. *See* KRS 142.211. Section 5(1) of House Bill 1 prohibited other providers, including the petitioning physicians, from similarly passing on their tax. *See* KRS 142.213(1).

The petitioners filed the herein action claiming that the Kentucky provider tax set forth in House Bill 1 was arbitrary and irrational, and constituted a violation of their federal and state guaranteed constitutional rights to Due Process (U.S. Const., Amend. XIV; Ky. Const. § 2) and Equal Protection (U.S. Const., Amend. XIV; Ky. Const. § 3). The petitioners also relied upon Kentucky Constitution § 59 — a Kentucky constitutional provision which prohibits "special" tax legislation.[6] The trial court did not reach the due process and equal protection arguments; instead, the court held House Bill 1 to be violative of Kentucky Constitution § 59. (*See* Appendix B). The Respondents appealed to the Kentucky Court of Appeals, and then sought a transfer of the case to the Kentucky Supreme Court. The transfer was granted.

After transfer, three justices of the Kentucky Supreme Court recused themselves from hearing the case. This recusal triggered Kentucky Constitution § 110(3), which

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[6]As held by the Kentucky Supreme Court in this case, the constitutional test for "special" legislation is very similar to the tests for due process and equal protection. *See Commonwealth v. Smith*, 875 S.W.2d 873, 876 (Ky. 1994).

authorized the Governor of Kentucky, Honorable Brereton C. Jones, to appoint three "special" justices to hear the appeal. This same Governor had called the 1993 special session of the Kentucky General Assembly — the session which produced House Bill 1 as its only piece of legislation. Governor Jones publicly took extreme pride in the passage of House Bill 1. Also, two of the Governor's executive agencies (the Kentucky Revenue Cabinet and the Cabinet for Human Resources) were appellants in the case. Moreover, Governor Jones authorized the hiring and selection of the state's outside counsel. However, instead of deferring his appointments to some disinterested authority (say, the Kentucky Chief Justice or the Kentucky Bar Association), the Governor personally named three practicing attorneys to sit on the appeal.[7]

This ad hoc tribunal overruled the petitioners' Motion to Recuse, and ultimately reversed the lower court on March 24, 1994. The decision was 5-2, with all three Gubernatorial appointees voting with the majority. The opinion held that House Bill 1 did not violate Kentucky Constitution § 59, nor were state or federal due process or equal protection guarantees offended. (*See* Appendix A). The rationale for the Court's opinion was basically three-fold: (1) The petitioners herein failed to affirmatively negate every conceivable rationale for the statute; (2) The 1991 Amendment to the federal legislation authorized and called for the Kentucky provider tax to be imposed on physicians — thus creating the rationality necessary to support due process and equal protection; and (3) Since physicians ostensibly benefit from Medicaid, it was fair and rational to impose a tax only upon them (as opposed to other segments of the public as a whole).

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[7]The Governor actually appointed four attorneys, but one chose to recuse himself after it was disclosed that his company had been employed by the state of Kentucky under a multi-million dollar health insurance contract.

The Petitioners filed a Petition for Rehearing on April 13, 1994, which was denied by the Kentucky Supreme Court (as empaneled by Governor Jones) on June 23, 1994. (*See* Appendix C).

REASONS FOR GRANTING THE PETITION

Without question, one of the most significant social and political issues in America today is health care reform. Inseparable from this serious concern is the interaction between the various federal and state social welfare programs, including the Medicaid program. Kentucky, through the political aspirations of its Governor, has sought to be one of the leaders in providing universal health care coverage for its citizens. Fundamental to this goal was the passage of House Bill 1 and its 2% gross revenue tax on physicians — a politically expedient group.

Kentucky's passage of House Bill 1 and the resulting litigation have been closely watched by many states, and will no doubt serve as the impetus for similar legislation and litigation in those states. Unless this petition is granted, this case will be but the first in a series of expensive and complex litigation certain to emanate as this nation struggles to fund health care programs such as Medicaid. The need for guidance from this Court at the outset of such a consequential issue is acute. This case presents a timely opportunity for this Court to establish the constitutional limits the states are constrained to observe in imposing taxes to fund health care legislation, as well as the proper interpretation of federal health care law.

Review of this case is especially compelling in light of the unique makeup of the Kentucky Supreme Court which upheld the physicians' tax against state and federal constitutional challenges. Specifically, the legislation at issue was drafted, sponsored and supported by the Governor of Kentucky — the same Governor who under the Kentucky Constitution appointed three special justices to the Kentucky Supreme Court to determine the constitutionality of

the tax. Not only do these appointments violate federal due process principles, the appointments should cause this Court to be suspect of the Kentucky Supreme Court's independence in upholding the tax by a 5-2 vote, wherein the three (3) gubernatorial appointees voted in the majority.

I. Kentucky's Provider Tax Was Upheld by an Unconstitutionally Empaneled Tribunal.

A "fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). Due process extends even to the more subtle indicia which create the appearance of or potential for impropriety. Stated simply, due process requires that litigants be granted a fair trial before an impartial decision maker that is constitutionally empaneled.

> Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. *That interest cannot be defined with precision. Circumstances and relationships must be considered.*

In re Murchison, 349 U.S. at 136 (emphasis added). Similarly, this Court has recognized that "[e]very procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the state and the accused denies the latter of due process of law." *Tumey* v. *Ohio*, 273 U.S. 510, 532 (1927); *see also In re Murchison*, 349 U.S. at 136 (quoting *Tumey*, 273 U.S. at 510).

The rule is a demanding one. This Court has recognized that the rule's application may disqualify judges who, in fact, are truly impartial. In order to maintain the institutional integrity of American courts, *and to ensure every litigant's due process right to a fair tribunal*, this Court has recognized the necessity of a rule with such absolute dimension. Specifically, this Court has held:

> The due process clause "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.'"

In re Murchison, 349 U.S. at 136 (citation omitted); *see also Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813, 825 (1986).

Due process requires (1) that the special justices who presided over this appeal be unbiased in fact, (2) that they have an appearance of being unbiased, and (3) that the method of their appointment be reasonably calculated to safeguard against the potential for impropriety and undue influence.

These requirements of due process were not satisfied in this case. The Governor of Kentucky, the Commonwealth's Chief Executive, employed a procedure which unconstitutionally altered the composition of the Court presiding over this appeal. The procedure, as designed and as applied in this case, contravened the Constitution of the United States. Specifically, the participation and votes of the three special justices in the March 24, 1994 Opinion of the Kentucky Supreme Court were void and violative of the due process rights of the petitioners. The Kentucky Supreme Court failed to recognize this unlawful encroachment of the petitioners' constitutional rights when the Court twice denied the Petitioners' Motion to Recuse, and again when the Court denied the petition for rehearing.[8]

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[8]Instead, the Court should have affirmed the opinion of the Franklin Circuit Court pursuant to the 2-2 vote of the properly seated members of the Kentucky Supreme Court as required by KRS 21A.060 and Rule 1.020(l)(a) of the Rules of the Kentucky Supreme Court. (This statute and the complementary Supreme Court rule provide that a tie vote in the Supreme Court affirms the opinion of the lower court. The rules by which this Court operates contain a similar provision. *See* 28 U.S.C. § 2109.)

These actions violate the petitioners' right to due process for at least three reasons.

First, the Governor who appointed the special justices had a personal interest in the outcome of this case. Second, each of the three special justices was a practicing attorney during his tenure on the Supreme Court. Finally, the procedure by which the special justices were appointed created constitutionally impermissible opportunities for impropriety and undue influence.

A. THE GOVERNOR'S PERSONAL AND POLITICAL INTEREST IN THE OUTCOME OF THIS CASE RENDERS VOID HIS APPOINTMENT OF SPECIAL JUSTICES.

Perhaps the most fundamental restriction on the Governor's appointing power rests in public policy. A public officer entrusted with the power of appointment, including the power to appoint special justices, should exercise that power solely for the benefit of the public. The law must secure the utmost freedom from personal interest in the making of appointments; otherwise, the appointments are void. *See, e.g., Wood* v. *Town of Whitehall*, 120 Misc. 124, 197 N.Y.S. 789 (Sup. Ct. 1923); *Hornung* v. *State*, 116 Ind. 458, 19 N.E. 151 (1888); 63A Am. Jur. 2d *Courts* § 100, at 743 (1984).

The purposes behind this policy are numerous and need little explanation. Ensuring the actual and perceived integrity of its judiciary, both regularly seated and specially appointed, is a paramount responsibility of the state. In appointing special justices, the Governor places them in offices of public trust. Any such office, particularly a judicial one, must remain distant and distinct from partisan politics in order to maintain the independence, impartiality and freedom which the public has a right to expect from their judiciary.

In the 1993 Special Session, Kentucky's Governor unequivocally manifested his bias in favor of the legislation. Indeed, Governor Jones has made health care reform for Kentucky the centerpiece of his administration. Thus, not only was the Governor personally involved in the legislation as the head of the executive branch of government, he also had a heightened personal interest in the outcome of this provider tax case.[9]

By making these three special justice appointments, the Governor created a situation in which the average citizen could reasonably believe that the makeup of the Kentucky Supreme Court was being manipulated to produce a certain result, and thus, to promote an individual's political aspirations. This violates every ideal of justice and fairness, including the Due Process Clause of the Fourteenth Amendment to the United States Constitution. In upholding the constitutionality of these appointments, the Kentucky Supreme Court assured that the denial of Petitioners' due process rights would be complete.

B. THE APPOINTMENT OF PRACTICING LAWYERS AS SPECIAL JUSTICES VIOLATES DUE PROCESS.

The selection of justices to the Kentucky Supreme Court is entrusted to the electorate. Ky. Const. § 117. Only in the most unusual case where two or more justices decline or are unable to sit can a vacancy be filled by appointment.[10] Subsection (3) of Section 110 of the Kentucky Constitution provides:

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[9]The extent of the Governor's involvement is amply demonstrated in the Petition for Writ of Certiorari filed by Petitioners Stuart G. Yeoman, M.D., Tim Hulsey, M.D., Joe Davis, M.D., and Joseph Janes.

[10]The system created by the Kentucky Constitution is similar to the system which allows this Court to proceed without recused justices so long as a quorum exists. *See* 28 U.S.C. §§ 1, 455 and 2109.

> A majority of the Justices of the Supreme Court shall constitute a quorum for the transaction of business. If as many as two Justices decline or are unable to sit in the trial of any cause, the Chief Justice shall certify that fact to the governor, who shall appoint to try the particular cause a sufficient number of Justices to constitute a full court for the trial of the cause.

Thus, if two or more justices recuse themselves, only the Governor is given the power to appoint special justices to the Kentucky Supreme Court and, pursuant to the requirements of due process, this power is carefully circumscribed. The Governor cannot appoint a single justice and must appoint a sufficient number to constitute a full court. Most important for purposes of this case, special justices must possess the same qualifications as regularly elected Supreme Court Justices. *See* Ky. Const. §§ 122, 123; KRS 21A.120(1). The most relevant qualification is embodied in Section 123 of the Kentucky Constitution, which provides that:

> During his term of office, no justice of the Supreme Court or judge of the Court of Appeals, Circuit Court or District Court shall engage in the practice of law, or run for elective office other than judicial office, or hold any office in a political party or organization.

This provision is reinforced by Section 110(5) of the Kentucky Constitution which permits only active or retired judges or justices to be appointed to a judicial body.

If the Kentucky constitutional directives in Section 110 and Section 123 are disregarded, the due process rights of persons subject to the tribunal are violated. When this occurs, the applicable law is clear. Since the office is held unlawfully, the appointed justice lacks jurisdiction to act, rendering void any actions taken by him. This Court has succinctly articulated this legal truism: "If the statute made him incompetent to sit at the hearing, the decree in which he took part was unlawful, and perhaps absolutely

void and should certainly be set aside or quashed by any court having authority to review it by appeal, error or certiorari." *American Construction Co.* v. *Jacksonville, Tampa & Key West Ry. Co.*, 148 U.S. 372, 387 (1893) (citations omitted).

Various other jurisdictions, including Kentucky, have adopted this principle. *See, e.g., Thompson* v. *Commonwealth*, 266 Ky. 529, 99 S.W.2d 705 (1936); *Feck* v. *Commonwealth*, 264 Ky. 556, 95 S.W.2d 25 (1936); *see also National Bank of Washington* v. *McCrillis*, 130 P.2d 901 (Wash. 1942). Moreover, in *Clements* v. *Ft. Worth & D.S.P. Ry. Co.*, 7 S.W.2d 895, 898 (Tex. App. 1928), the court held:

> [A] judgment rendered by a special judge who had not been appointed or selected in accordance with the constitutional and statutory requirements governing such matters is an absolute nullity, and that before a special judge can be appointed or selected, the conditions pointed out by the Constitution and the statute must exist before such selection or appointment of the special judge is valid.

Under the foregoing rule, the participation of the three special justices in this case was void. Not surprisingly, the special justices cast the deciding votes and obviously controlled the ultimate decision. The justices properly seated in this appeal were equally divided 2-2: two voting to affirm the Franklin Circuit Court's opinion and two voting to reverse. Clearly, Section 123 made the special justices incompetent to sit in review of this case and rendered their appointments unlawful and their participation and votes void *ab initio*. Therefore, to satisfy the petitioners' right to due process, the judgment of the Franklin Circuit Court must be reinstated pursuant to the tie vote of the constitutionally empaneled justices. *See United States* v. *Emholt*, 105 U.S. 414 (1882); *Nelson* v. *Carland*, 42 U.S. (1 How.) 265 (1843). This result is compelled not only because the

parties are entitled to it, but because public policy surrounding the fair administration of the judicial process demands it.

C. THE APPOINTMENT OF PRACTICING LAWYERS AS SPECIAL JUSTICES CREATED CONSTITUTIONALLY IMPERMISSIBLE OPPORTUNITIES FOR IMPROPRIETY AND UNDUE INFLUENCE IN VIOLATION OF THE REQUIREMENTS OF DUE PROCESS.

The shroud of impropriety created by the appointment of practicing lawyers as special justices deprived the petitioners of their constitutionally protected right to due process. When an attorney from the active bar is selected to sit as a special justice, there is the likelihood that the appointee has or will later have a case before the Supreme Court for which he or she has been specially chosen. Such an appointee may find it difficult to take a position contrary to the opinion of the majority and/or the chief justice so as not to alienate those justices in his or her litigation. This presents an obvious and unacceptable conflict of interest: The role of advocate is wholly incompatible with the role of jurist. *See Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813 (1986).

This conclusion, arising from the requirements of due process, is further supported by Kentucky Constitution Section 110(5)(b). This provision directs the Kentucky Chief Justice, in appointing special judges for the lower courts in Kentucky, to select only active or retired justices or judges, and not practicing attorneys. The reason, no doubt, is to keep practicing attorneys from deciding cases where they, or their clients, might exert bias or influence into the process. It would be both paradoxical and illogical, for the Kentucky Constitution to allow the Governor to inject onto the Kentucky Supreme Court the precise risk of bias prohibited by Section 110(5)(b) from being placed onto courts of lesser prominence.

The due process right to an impartial tribunal demands that *any* process of appointing special justices be reasonably calculated to prevent impermissible impropriety and undue influence. Kentucky's system, *as applied in this case*, has failed to provide the requisite assurances of due process. Accordingly, the due process guarantee of the United States Constitution demands that this procedure be stricken.

II. Kentucky's Provider Tax Creates an Arbitrary and Discriminatory Classification in Violation of the Equal Protection Clause of the United States Constitution.

While this Court has traditionally accorded deference to state taxation classifications, any such classification must nevertheless satisfy the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Allegheny Pittsburgh Coal Co.* v. *County Com. of Webster County*, 488 U.S. 336 (1989). Kentucky's provider tax as found in House Bill 1 (and as reenacted in 1994 in House Bill 250) unreasonably singles out certain health care providers for a tax levied to fund Kentucky's Medicaid program. Because the program funded by the tax inures to the benefit of the Kentucky citizenry as a whole, *and confers no special benefit upon the providers forced to fund that program*, the imposition of the provider tax constitutes a denial of equal protection of the laws in contravention of the Fourteenth Amendment to the United States Constitution.

As this Court noted in *F. S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1900), to be constitutional a classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

On its face, the classification found in Kentucky's provider tax is arbitrary and is not based upon any sound distinction between physicians and the population generally. The "object of the legislation" is the raising of revenues to fund Kentucky's Medicaid program. This social program inures to the benefit of the population as a whole in that it ensures at least a minimal level of health care to the indigent. Physicians gain no special benefit from Medicaid; in fact, physicians already support the Medicaid program to a greater degree than the general populace through reduced fees and other accommodations. To the extent physicians are compensated through Medicaid, that compensation is merely *quid pro quo* for medical services rendered.[11] Indeed, House Bill 1 is actually perverse — for it financially penalizes those who render the precise Medicaid services desired by the state. Thus, the tax discourages the rendering of the service — it does not promote it.

Because the benefit derived from the provider tax inures to the benefit of all society generally, House Bill 1 unjustly and unconstitutionally saddled a discreet minority — physicians — with a disproportionate share of the expense of this benefit. As the Court has recently noted: "The Equal Protection Clause . . . keeps governmental decision-makers from treating differently persons who are in all relevant respects alike." *Nordlinger* v. *Hahn*, ___ U.S. ___, 112 S.Ct. 2326, 120 L.Ed. 2d 1, 12 (1992). For purposes of a tax to fund Medicaid, the physicians of Kentucky and the citizenry as a whole "are in all relevant

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[11]In *Butler* v. *United Cerebral Palsy of Northern Kentucky, Inc.*, 352 S.W.2d 203, 205 (Ky. 1961), the Kentucky court held that the private institutions providing care for handicapped children were not beneficiaries of state aid being paid to the institutions; rather, the beneficiaries were the persons receiving the care.

respects alike," rendering the tax imposed solely against physicians violative of equal protection.

This Court has recently declined the opportunity to determine whether a "status tax" such as that imposed against physicians by Kentucky's provider tax can withstand scrutiny under the Fourteenth Amendment to the United States Constitution. *Coy* v. *Florida Birth-Related Neurological Injury Compensation Plan*, 595 So.2d 943 (Fla. 1992), *cert. denied, McGibony* v. *Florida Birth-Related Neurological Injury Compensation Plan*, ___ U.S. ___, 113 S.Ct. 194, 121 L.Ed. 2d 137 (1992). In denying *certiorari*, this Court let stand a tax imposed by the State of Florida against all doctors to create a fund to compensate victims of birth-related neurological injuries. The tax was challenged on the ground that it benefited only obstetricians and the public generally, yet was imposed against physicians as a class, including those who had no involvement with the delivery of babies.

Kentucky's tax pushes the "status tax" question to a higher level than that reached in *Coy*. In *Coy*, it was undisputed that at least some physicians benefited from the program funded by the tax to a greater extent than members of the public generally. Moreover, the program at issue in *Coy* involved a medical condition, thus raising various potential bases on which to relate the program to physicians. Conversely, the societal ill addresses by Medicaid is wholly economic, rather than medical, and the physicians of Kentucky have not caused or contributed to the indigence that makes Medicaid necessary and desirable. Physicians receive no greater benefit from Kentucky's ability to fund health care for the indigent than do other citizens of Kentucky, as was tacitly acknowledged by the Kentucky Supreme Court. *Commonwealth* v. *Smith*, 875 S.W.2d 873, 876 (Ky. 1994) ("The populace, as a whole, derives benefits from a healthy citizenry.") The present

case thus places the constitutionality of a so-called "status tax" more squarely before this Court than did *Coy*.[12]

Review of this case would also allow the Court to explain and to apply the principles of *Davis* v. *Michigan*, 489 U.S. 803 (1989), to a case which does not necessarily involve the doctrine of intergovernmental immunity (as did *Davis*), but does involve substantial federal interests being discriminated against by a state tax. In *Davis*, this Court struck down a Michigan tax scheme which exempted state pensions from tax, but not federal pensions. After concluding that facial discrimination existed against federal retirees, the Court rejected the rationales sponsored by the state to justify the distinctions. The Court in *Davis* noted: "In determining whether this standard of justification has been met, it is inappropriate to rely solely on the mode of analysis developed in our equal protection cases . . . because 'the Government's interests must be weighed in the balance.'" 489 U.S. at 816 (quoting *Phillips Chemical Co.* v. *Dumas Independent School Dist.*, 361 U.S. 376, 385 (1960)). In the case at bar, the Court will be called upon to determine whether the federal government's interest must be weighed in an equal protection analysis.

The provider tax imposed by Kentucky in House Bill 1 had its genesis in the federal Medicaid statutes prior to 1990. Medicaid was and is a federal program to be administrated by the states; certainly the approximately 2.5 to 1 federal match demonstrates the degree of federal interest in seeing that indigent Americans receive health care. In 1990, solely as a mechanism to extract greater federal funds,

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[12]By analogy, if House Bill 1 were constitutional, a state could tax grocery stores on *all* of their gross receipts to fund the Food Stamp program; could tax lawyers on all of their fees to fund the judicial system; and could tax policemen to fund the prison system.

Kentucky passed KRS 205.575, a phantom tax on doctors which could then be used to obtain federal matching funds.[13] Consequently, only because of this federal Medicaid program did physicians find themselves being taxed in 1990; and only because the 1991 Amendment undertook to apply some criteria to these schemes did the classification of Kentucky physicians continue. Indeed, in its present form, the tax imposed by House Bill 1 remains a tax used solely to obtain more federal Medicaid funds from those persons eligible to participate as physicians in the federal Medicaid program. Since Medicaid reimbursement is less than standard physician charges, the tax imposed by House Bill 1 in effect provides a disincentive for physicians participating in Medicaid, and thereby frustrates the federal Medicaid program as a whole. For such a serious result, Kentucky seemingly would have to have a strong rationale to support the classification of physicians. No such rationale exists. Accordingly, this case presents the Court with the opportunity to explain the impact of *Davis* v. *Michigan* on attempts by states to interfere with federally mandated programs via unlawful tax classifications.

There is no legitimate or rational basis for imposing upon physicians a special tax to help fund Kentucky's Medicaid program. In reality, of course, physicians (and other health care providers) have been singled out for the simple reason that they are a politically expedient target. It is precisely this sort of selective taxation that the Equal Protection Clause of the Fourteenth Amendment prohibits. The potentially far-reaching implications of permitting the imposition of taxes based merely on status warrant resolu-

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[13]As an aside, the KMA opposed the passage of KRS 205.575.

tion of this important constitutional question by this Court.[14]

The Kentucky Supreme Court ruled against the petitioners' argument by noting that physicians receive benefits from Medicaid. *Commonwealth* v. *Smith*, 875 S.W.2d at 876. As noted, however, physicians' "benefits" are no more than payment for services rendered. Furthermore, other entities receive monies from Medicaid, yet they were not taxed by House Bill 1. For example, Kentucky taxicabs and other transportation companies receive millions of dollars annually for services provided to Medicaid. Also, nurse midwives, nurse practitioners and dental services were not taxed[15] although each of these providers participated in Medicaid. These circumstances compel the conclusion that Kentucky's taxing scheme created by House Bill 1 unconstitutionally singled out physicians as a class to fund Medicaid. Allowed to go unchecked by this Court, Kentucky's discriminatory tax treatment of health care providers will no doubt encourage similar taxes in other states.

III. The Kentucky Supreme Court Misconstrued Federal Law in Upholding Kentucky's Discriminatory Provider Tax.

The Kentucky Supreme Court first ruled that Kentucky's discriminatory provider tax was rationally based on federal law. *Commonwealth* v. *Smith*, 875 S.W.2d 873, 876 (Ky. 1994) ("Simply put, the Kentucky statute was designed to meet the federal statute which provides and enumerates the specific requirements as to the class of

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[14]Already, provider taxes similar to Kentucky's have been passed in West Virginia (W. Va. Code § 11-27-16 (1994)) and Minnesota (Minn. Stat. § 295.52 (1993)).

[15]Peculiarly, the tax was expanded to include dental services after passage of House Bill 1 because of a change in federal law, not state law.

health care providers that may be taxed in order to qualify for matching funds."). The Court then concluded that, because of this federal basis, the tax withstands scrutiny under the Constitution of Kentucky. *Id.* ("Thus, when a state elects to enact a provider tax, its discretion in classifying those who will be taxed appears circumscribed by federal law. Thus, defining the class in a coextensive manner with the federal law results in a rational basis for such classification without arbitrariness."). However, in making these rulings, the Kentucky Supreme Court misconstrued the relevant federal law and thereby determined the constitutional questions under a misinterpretation of federal law. This erroneous construction of federal law renders the opinion upholding the tax invalid.

While the Kentucky Supreme Court is the final arbiter of questions arising under the Constitution of Kentucky, where, as here, that court bases its determination of a state constitutional question on an erroneous interpretation of *federal* law, this Court has jurisdiction pursuant to 28 U.S.C. §1257(a). *See Three Affiliated Tribes of Ft. Berthold Reservation* v. *Wold Engineering*, 467 U.S. 138, 152 (1984) ("If the state court has proceeded on an incorrect perception of federal law, it has been this Court's practice to vacate the judgment of the state court and remand the case so that the court may reconsider the state-law question free of misapprehensions about the scope of federal law."). Moreover, because the Kentucky Supreme Court's misapplication of federal law also resulted in its upholding the tax against federal constitutional challenge, this Court should review the decision rather than merely remand. *See Commonwealth* v. *Smith*, 875 S.W.2d at 878 ("Sections 1, 2 and 3 of the Kentucky Constitution embrace the equal protection clause to the Fourteenth Amendment to the United States Constitution.").

The Kentucky Supreme Court relied upon the 1991 Medicaid Amendment in upholding Kentucky's provider tax. Under this Amendment, the level of state expenditures used to determine the level of federal matching funds must be reduced by impermissible "health care related taxes." When a state tax is "related to" health care services, to qualify for matching funds the Amendment requires the tax: (1) to be broad-based; (2) to be uniformly imposed; and (3) to not hold taxpayers harmless for their tax costs. Health care-related taxes which fail to meet the three criteria are impermissible, the revenues from which will be subtracted from the state's medical assistance expenditures qualified to receive matching federal funds. *Significantly, non-health care related taxes are not subject to these three criteria, and are entitled to receive the full level of corresponding federal matching funds.*

In light of the foregoing Amendment, Kentucky's 1990 tax scheme was not entitled to receive federal matching funds. Kentucky therefore passed House Bill 1, a provider tax which meets the requirements of federal law to receive matching funds. However, the Kentucky Supreme Court, in upholding House Bill 1, went much further than the federal statute permits — *i.e.*, the Kentucky Court held that the 1991 Amendment compelled the state to pass a provider tax, and that such federal compulsion served as the basis for "rationality" under the Equal Protection Clause. This reasoning is flawed — instead of the premises being used to support the conclusion, just the opposite has occurred. Indeed, the 1991 Amendment's requirements are triggered only *after* a state makes the initial determination to tax one or more of the enumerated classes of health care items or services. The 1991 Amendment leaves to the states the determination of whether to tax a particular class in the first instance, and whether the classification passes constitutional state muster.

The distinction between what the 1991 Amendment actually provides and what the Supreme Court of Kentucky interpreted it as providing is unmistakable. The 1991 Amendment requires only that any state health care-related tax meet the three requirements in order to receive the federal match. The Amendment says nothing about the legality of the imposition of the tax in the first instance. This could not be clearer. In *Medicaid Program; Limitations on Provider-Related Donations and Healthcare-Related Taxes; Limitations on Payments to Disproportionate Share Hospitals*, 58 Fed. Reg. No. 155, at 43,157 (1993), the Department of Health and Human Services, Health Care Financing Administration declared: "Nothing in [the 1991 Amendment] was intended to encourage or sanction taxes on health care providers. Rather, the provisions of the law and implementing regulations merely stipulate the rules governing the availability of FFP [federal financial participation] when States impose such taxes."

The Kentucky Supreme Court erroneously determined that the 1991 Amendment "mandate[d]" that the legislature tax only the enumerated health care items or services. *Commonwealth* v. *Smith*, 875 S.W.2d at 876. However, the 1991 Amendment cannot be relied upon as a basis to support the constitutionality (state or federal) of such classifications. In fact, because the 1991 Amendment is best viewed as operating to discourage health care related taxes, it is fundamentally irrational to interpret the same Amendment as placing a federal imprimatur on such discriminatory taxes.

The gravity of the error committed by the Kentucky Supreme Court is substantial. In effect, the Kentucky Supreme Court has tested the state and federal constitutionality of Kentucky's provider tax on a clearly erroneous interpretation of federal statutory law. The crucial interplay between the federal government and the states in the administration of the Medicaid program demands this Court's intervention.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari filed by Charles C. Smith, Jr., M.D., Fred L. Barnett, M.D., William B. Monnig, M.D., and the Kentucky Medical Association, should be granted.

Respectfully submitted,

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TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

93-SC-946-TG

COMMONWEALTH OF KENTUCKY, REVENUE CABINET; KIM BURSE, in her official capacity as Secretary; KENTUCKY REVENUE CABINET; COMMONWEALTH OF KENTUCKY, CABINET FOR HUMAN RESOURCES; FONTAINE BANKS, JR., in his official capacity as Secretary; KENTUCKY CABINET FOR HUMAN RESOURCES; KENTUCKY HEALTH CARE DATE[sic] COMMISSION - - - - - - - - - - *Appellants*

v.

CHARLES C. SMITH, JR., M.D.; FRED L. BARNETT, M.D.; WILLIAM B. MONNIG, M.D.; KENTUCKY MEDICAL ASSOCIATION; STUART G. YEOMAN, M.D.; TIM HULSEY, M.D.; JOE DAVIS, M.D., President, Warren County Medical Society; JOSEPH JANES - - - - - - - - - - *Appellees*

On Transfer From Court of Appeals
No. 93-CA-002840
(Franklin Circuit Court No. 93-CI-000959)

OPINION OF THE COURT BY JUSTICE REYNOLDS REVERSING

This appeal is from the final judgment of Franklin Circuit Court for which transfer was granted. CR 74.02. The enactment of House Bill 1, "the provider tax," (codified as KRS 142.201-142.259 and KRS 216.270-216.287), was the subject and product of an extraordinary session of the 1993 Kentucky General Assembly. The trial court determined

that a tax on physicians violated Section 59 (15) of the Kentucky Constitution. To the extent provided in this opinion, we reverse the lower court's decision and hold that the health care provider tax as applied to physicians is constitutional.

Under the Medicaid program, of the 7,132 Kentucky licensed physicians and clinics, 4,514 treat and provide services to Medicaid patients. Under House Bill 1, a 2 percent of gross revenue tax was imposed on physicians' services and the tax proceeds are utilized to obtain federal matching money to support Kentucky Medicaid. Thirty-one percent of the state's share of the Medicaid expenditures is derived from the providers' tax monies which are available for the matching funds. The state's general fund provides the rest of the state's share. The question is whether the General Assembly lacks the ability to define the class of providers being taxed.

It is neither the wisdom or expediency of this legislation that concerns the court, for that is a matter for the legislative branch of our government. The sole duty herein is scrutiny of the act in light of the constitution.

It is the specter of unconstitutional classification that has formed the basis of appellees' argument. The broad discretion as to classification which a legislature possesses in the field of taxation has long been recognized. Discretion is needed in the formulation of basic and sound tax policies and classification is appropriate for fitting tax programs to both usages and needs. It has been held, because of these factors, that in taxation, more so than in other fields, the legislative bodies possess the greatest of freedom in classification. *Madden* v. *Kentucky,* 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590 (1940). Courts, under a rational basis review, accept the legislature's generalizations even when there is an imperfect fit between means and ends. *Heller* v. *Doe By Doe,* ____ U.S. _____, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993). Further, in a taxation case, unless a rational basis for such law can be completely refuted, then the law may stand as constitutional. Notably, the burden

on the ones attacking the legislative tax arrangement is the negation of every conceivable basis which might support it.

Vital state interest does, in fact, in this case mean vital state interest as this state provides medical care to over 500,000 Kentuckians, which is over 14 percent of this state's citizenry, under the provisions of the Kentucky Medical Assistance Program (Medicaid). There is an established federal criteria for states to obtain federal matching funds for the Medicaid program and it was amended in 1991, necessitating a state change. Therefore, to qualify for federal matching money, any tax on health care providers was required to be uniform and broad based within each class of taxed providers. Omitted was the ruse of hold harmless provisions whereby the participating physicians were permitted recoupment.

In this case, were the state to run afoul by imposing a tax considered impermissible under the federal regulations, there would occur a reduction of the state's total medical assistance by the amount of any impermissible health care tax that is collected. This act under consideration applies to *all permissible health care providers,* whether or not they participate in the Medicaid program, and complies with federal criteria because of its uniformity and broad base. The annual provider tax revenues generated by the act have been legislatively estimated to be approximately $147 million, of which $32.4 million is attributable to the tax on physicians.

Franklin Circuit Court reasoned that the 2 percent tax on physicians' gross revenues provided for in House Bill 1 violated Section 59 of the Kentucky Constitution, which prohibits special legislation, and utilized the cases of *City of Louisville* v. *Kuntz,* 104 Ky. 584, 47 S.W. 592 (1898) and *Board of Educ. of Jefferson Co.* v. *Board of Educ. of Louisville,* Ky., 472 S.W.2d 496 (1971), as supportive of its position. Noted, but without discussion, was that the tax was not limited to 60 percent of the physicians that participated in the Medicaid program, but applied to all physi-

cians rendering health care services in the state. Thus, it was concluded that the increase in funding and the indirect benefit to only 60 percent of the doctors who did participate in providing services did not support a rationale for overcoming Kentucky Constitution Section 59(15). The classifications were deemed to be illogically related to the purpose of the act. We find such conclusion unacceptable.

The enacted legislation and federal criteria as to qualification for federal matching money forms a rational basis in the General Assembly's actions resulting in House Bill 1. These federal mandates were not illusionary, but were real and pressing at the time of the legislation. Simply put, the Kentucky statute was designed to meet the federal statute which provides and enumerates the specific requirements as to the class of health care providers that may be taxed in order to qualify for matching funds. The trial court was in error by finding the classifications illogically related to the purpose of the act.

The mammoth scope of the Medicaid program provides such an enormous subsidy to the health care system so as to benefit all health care providers, whether they participate in direct reimbursement provisions or not. It follows that it is not illogical for the General Assembly to tax the health care industry for 31-plus percent of the state's funds which are to match the scope of the much larger federal funds. The prevalence of provider taxes serves to establish the perimeters of the class providers who could be taxed to fund Medicaid. The Kentucky statute, as the parties appear to concede, is coextensive with the federal law. Thus, when a state elects to enact a provider tax, its discretion in classifying those who will be taxed appears circumscribed by federal law. Thus, defining the class in a coextensive manner with the federal law results in a rational basis for such classification without arbitrariness. The act delineates the class of entities subject to the tax and, thus, the General Assembly necessarily excludes and includes certain entities within the scope of the tax. Judicial approval given to legislative classifications for tax purposes appears

to be well established. *Department of Revenue* v. *Spalding Laundry and Dry Cleaning Co.*, Ky., 436 S.W.2d 522 (1969).

It has been further established that classification is permissible when it appears as a natural method of legislation, as long as the classification is neither unreasonable nor arbitrary and, thus, applies equally to all in a class. *Schoo* v. *Rose*, Ky., 270 S.W.2d 940 (1954). A requisite, therefore, is the rationality of the basis as between the classification established and the governmental purpose to be achieved. As there is no suspect classification in this case, the act meets the rational basis standard to be deemed constitutional.

Section 59(15) of the Kentucky Constitution prohibits "local or special acts" which are "to authorize or regulate the levy, the assessment or the collection of taxes . . . ." The primary purpose of Section 59 and the 29 subsections is the protection of Kentucky's citizenry from special interest groups. *Tabler* v. *Wallace*, Ky., 704 S.W.2d 179 (1985), *cert. denied*, 479 U.S. 822, 107 S.Ct. 89, 93 L.Ed.2d 41 (1986). Reasons of a positive nature are necessary for justifying the legislation.

To overcome freedom of classification and the presumption of validity requires an explicit demonstration that a tax is hostile and oppressive against particular persons and classes. *Delta Air Lines, Inc.* v. *Com., Revenue Cabinet*, Ky., 689 S.W.2d 14 (1985). State tax statutes provide many examples of classifications and due process, and equal protection analysis in tax matters requires the court to determine simply whether there is a rational basis for the legislative action. *Federal Communications Commission* v. *Beach Communications, Inc.*, ___ U.S. ____, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993); *Reynolds Metal Co.* v. *Martin*, 269 Ky. 378, 107 S.W.2d 251 (1937).

The populace, as a whole, derives benefits from a healthy citizenry. The providers of health care may receive immediate and direct results of a fund that pays their charges/fees for treatment of the indigent. No physician taxed is prohibited from participating in the Medicaid program, but

some voluntarily do not participate. Recognizing such, the General Assembly afforded the ability to participate in Medicaid a necessary prerequisite to being subject to the tax.

Supportive of a class legislation is the public purpose of indigent care which forms a reasonable basis for levying a tax on such classes enumerated by the federal government. The legislature, in this case, has acted within the classification perimeters and, in effect, resisted the overtures of health care lobbyists by their revision of the health care provider tax to be used as a portion of the state's matching funds for the federal Medicaid fund. House Bill 1 addresses a completely different legislative situation than the *Tabler* court addressed.

The Florida Supreme Court in the case of *Coy* v. *Florida Birth-Related Neurological Injury Compensation Plan,* 595 So.2d 943 (Fla. 1992), determined there was a rational relationship of a health care related tax imposed on all licensed physicians, not merely obstetricians, to fund a state-wide program which compensates victims of birth-related neurological injuries, despite the fact that not all physicians taxed were obstetricians who would benefit. The basic rationale, in part, is the relationship of a tax to the delivery of health care in general. Herein, all physicians taxed under House Bill 1 may participate in the Medicaid program and receive direct benefits. It is natural and reasonable that the 40 percent of the physicians who pay the tax but do not participate in the Medicaid program may continue their type of practice with a diminished strain on the hospital system. Said otherwise, the 40 percent of the physicians are not in a vacuum in relation to the 60 percent, and there is a rational interrelationship between the two percentages of physicians, with each group having real benefits.

Standards applicable are succinctly stated in Justice Wintersheimer's concurring opinion in *Gillis* v. *Yount,* Ky., 748 S.W.2d 357 (1988), which follows:

> Constitutional limitations prohibit only such classification which is not [sic] arbitrary and unreasonable

> and has no fair and substantial relation to the permissible governmental purpose of the legislation. The classification for taxation is a policy matter for legislative determination. Ordinarily the judgment of the legislature is to be deferred to if there is any just and reasonable basis to support such a decision. The question then becomes whether it was arbitrary and unreasonable for the legislature to create a separate classification . . . . (Citation omitted).

Appellees have argued that the provider tax is unconstitutional because the legislature should have enacted a more broadly based tax, the argument being that a classification is unconstitutional as being special legislation if a more general law could have been enacted. Section 59(29) merely adds to the list of 28 prohibitions and states: "In all other cases where general law can be made applicable, no special law shall be enacted." Thus, the legislation must first be special (arbitrary) under the *Gillis* v. *Yount* test, but relate to a subject not covered in the 28 enumerated subsections for Section 59(29) to be applicable. Stated otherwise, any law not as broad as might be envisioned would be unconstitutional. The fact that an alternative is available to the legislature does not render unconstitutional the alternative which has been chosen by the legislature. For example, the progressive income tax would be unconstitutional, as well as all exemptions from the sales tax. When taken to an extreme, this argument would deprive a legislature of any discretion in making classifications for taxation and from creating exemptions.

The enactment of a state statutory plan based on a voluntary federal statutory plan was determined to be general legislation and constitutional under Section 59. *See Waggoner* v. *Waggoner,* Ky, 846 S.W.2d 704 (1993), *cert. denied,* ___ U.S. ___, 114 S.Ct. 346, 126 L.Ed.2d 310 (1993). *Waggoner* further provides that the fact that the legislature deals with a special subject does not *per se* make it special legislation. *See Kentucky Milk Marketing and Anti-Monopoly Commission* v. *Borden Co.,* Ky., 456 S.W.2d 831 (1970). A general law relates to persons or things as a

class, while a special law relates to particular persons or things of a class, per *Waggoner*. The tax in this case imposed upon the physicians, a federally defined class, meets the definition of a general law. The appellees' argument of an underinclusive class is not persuasive.

The rational basis for enacting this legislation is referenced in this record and existed at the time of the statute's enactment.

Sections 1, 2 and 3 of the Kentucky Constitution embrace the equal protection clause of the Fourteenth Amendment to the United States Constitution. While the circuit court omitted any reference/basis for its decision as to whether House Bill 1 violates principles of due process and equal protection, we find that by meeting the test of Section 59, House Bill 1 also meets the test of Sections 2 and 3 of the Kentucky Constitution. Such concern was addressed in *Revenue Cabinet* v. *Estate of Marshall,* Ky. App., 746 S.W.2d 408 (1988), which holds that classifications were not *per se* unreasonable since a rational basis has been determined for the classifications. Moreover, the *Tabler* court found Section 59 of the Kentucky Constitution to be more than simply restating the generalized language of the equal protection clause of the Fourteenth Amendment to the United States Constitution. Justification under Section 59 equates to reasonable justification under Sections 2 and 3 of the Kentucky Constitution.

A cross-appeal, pursuant to CR 74.01, was not filed herein, but has been included among the issues discussed by appellees. The title of House Bill 1 was styled: "An Act relating to health and safety, providing for revenues to finance health care, making appropriations, and declaring an emergency." Violation of Section 51 of the Kentucky Constitution was raised in that "no law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title. . . ." Construction of this section has found a liberal course with all doubts as to compliance resolved in favor of the validity of the legislative action. *Commonwealth ex rel. Armstrong* v. *Collins,*

Ky., 709 S.W.2d 437 (1986). Continuing, if the title furnishes a "clue" to the act's contents, it may pass constitutional muster. *See Talbott, Auditor of Pub. Accts.* v. *Laffoon,* 257 Ky. 773, 79 S.W.2d 244 (1934). Further illustrative are the cases of *District Bd. of Tuberculosis Sanatorium Trustees of Fayette Co.* v. *Bradley,* 188 Ky. 426, 222 S.W. 518 (1920); *Anderson* v. *Wayne Co.,* 310 Ky. 597, 221 S.W.2d 429 (1949); and *Dawson* v. *Com., Dept. of Transp.,* Ky., 622 S.W.2d 212 (1981). We suggest that a party reading the title to House Bill 1 might conclude that a tax was being imposed to finance health care as it stated " . . . providing for revenues to finance health care . . . ." This argument concerning misinformation or misunderstanding is without merit due to the fact that the appellees were also in attendance during the hearing and the special legislative session. Their presence, coupled with high media visibility and debates, makes it hard to conclude that this legislation comports with the intent of the constitutional framers to invalidate the statute on the ground that its title is not sufficiently descriptive.

We do not find that a benefit/burden analysis forms a basis of support for the providers, *Sims* v. *Board of Educ. of Jefferson Co., Ky.,* Ky., 290 S.W.2d 491 (1956), nor does Section 59(15) of the Kentucky Constitution require exactingly equal treatment. In essence, unequal treatment has been acceptable. *Reynolds Metal Co.* v. *Martin, supra.*

The appellants agree that the circuit court properly severed Sections 22 through 29 of House Bill 1. Therefore, this matter is a nonissue as it is neither essential to, nor inseparable from the other provisions of House Bill 1.

The appellees' motion for the recusal of the three special justices of this court was passed to the merits. The appointment by the governor of three special justices under Section 110(3) of the Kentucky Constitution was occasioned by the recusal of three sitting justices, which appellees now deem to he violative of that section, which provides:

> A majority of the justices of the Supreme Court shall constitute a quorum for the transaction of business. *If as many as two justices* decline or are unable to sit in the trial of any cause, the chief justice shall certify that fact to the governor, who shall appoint to try the particular cause *a sufficient number of justices to constitute a full court* for the trial of the cause.

The language of this constitutional section, deemed limiting, simply does not lead to the interpretation advanced by appellees. To resolve a limiting doubt, if any, one may read and consider, in its entirety, the language in Section 110(3), which provides that the governor "shall appoint to try the particular cause a sufficient number of justices to constitute a full court. . . ." We resolve that a gubernatorial appointment under this section arises from the necessity to appoint two or more special justices, the number of vacancies of two or more being the determinative factor for appointment.

The phraseology which appellees attribute to *Kentucky Utilities Co.* v. *South East Coal Co.*, Ky., 836 S.W.2d 407, (1992), *cert. dismissed*, ___ U.S. ___, 113 S.Ct. 1147, 122 L.Ed.2d 498 (1993), does not flow therefrom in a manner or with a meaning that inhibits the gubernatorial appointment of two justices or a sufficient number that would constitute a full court. The Supreme Court Rules neither address nor provide for the appointment of more than one justice. *Kentucky Utilities, supra,* addressed the authority and manner of appointment when only one justice was disqualified. *Ex parte Auditor of Public Accounts,* Ky., 609 S.W.2d 682, 685 (1980) states this court's position as to the filling of vacancies when two or more justices are recused:

> The constitutional check-and-balance relationship between the executive and judicial branches of the government consists of the provisions for filling vacancies in judicial offices and for the appointment of temporary substitutes *when two or more justices of the Supreme Court decline or are unable to participate in the disposition of a cause pending before that court.* Const. Secs. 118, 110(3). Those relationship between the leg-

> islature and judicial branches exist by virtue of Const. Secs. 110(4), 111(1), 112(2) and (3) and 113(2) and (3), pertaining to judicial districts and number of judges and justices; . . .

This direction has continued to be recognized and followed consistently in those situations requiring the appointment of two or more special justices. *See J.C.J.D.* v. *R.J.C.R.*, Ky., 803 S.W.2d 953 (1991), wherein all justices of the Supreme Court recused and the disposition of the particular case was decided by seven special justices, appointed by the governor, pursuant to Constitutional Section 110(3), to constitute a full court. The gubernatorial appointment of a "special" justice to the Supreme Court is further addressed in KRS 21A.120(1).

No argument has been sufficiently advanced as to raise an infirmity under the federal and state constitution which results from the governor's fulfilling his duties of judicial appointment under Section 110(3). Neither is there a necessity to develop a convoluted construction supportive of Section 110(3). We acknowledge the argument which has been advanced by the providers pertaining to the governor's active participation in the question of health care reform. The allegation of the appointment of "tainted" special justices ignores those constitutional sections which require the governor to make appointments in light of his constitutional duties. We believe that the question of recusal of each individual special justice has been addressed in this record and was determined as stated in the concurring opinion of *Kentucky Utilities*. Thus, recusal is a personal matter to be decided by each individual justice in the absence of any so-called *per se* disqualification or statutory prohibition.

The appellees' challenges extend even further and relate to the governor, his relationship to and interest in the legislation, political association with the appointees, and the like. Suffice it to say that the affidavits at no point make allegations of impropriety against the three sitting special justices nor have specific allegations of bias or preju-

dice been raised against them. Special justices and regular justices, when no valid reasons for recusation exist, have a duty to sit. *See Pessin* v. *Keeneland Ass'n,* 274 F.Supp. 513 (Ky. 1967); *Foster* v. *Commonwealth,* Ky., 348 S.W.2d 759 (1961), *cert. denied* 368 U.S. 993, 82 S.Ct. 613, 7 L.Ed.2d 530 (1962).

To the extent provided in this opinion, we reverse the lower court's decision and hold that the health care provider tax as applied to physicians is constitutional.

Stephens, C. J., Special Justice S. Cawood, Special Justice B. Fletcher III, and Special Justice R. Westberry concur.

Stumbo, J., dissents by separate opinion in which Wintersheimer, J. joins.

Wintersheimer, J., concurs in part and dissents in part by separate opinion in which Stumbo, J. joins.

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SUPREME COURT OF KENTUCKY

93-SC-946-TG

COMMONWEALTH OF KENTUCKY, REVENUE CABINET; KIM BURSE, in her official capacity as Secretary; KENTUCKY REVENUE CABINET; COMMONWEALTH OF KENTUCKY, CABINET FOR HUMAN RESOURCES; FONTAINE BANKS, JR., in his official capacity as Secretary; KENTUCKY CABINET FOR HUMAN RESOURCES; KENTUCKY HEALTH CARE DATE[sic] COMMISSION - - - - - - - - - - *Appellants*

v.

CHARLES C. SMITH, JR., M.D.; FRED L. BARNETT, M.D.; WILLIAM B. MONNIG, M.D.; KENTUCKY MEDICAL ASSOCIATION; STUART G. YEOMAN, M.D.; TIM HULSEY, M.D.; JOE DAVIS, M.D., President, Warren County Medical Society, JOSEPH JANES - - - - - - - - - - *Appellees*

On Transfer From Court of Appeals
No. 93-CA-002840
(Franklin Circuit Court No. 93-CI-000959)

DISSENTING OPINION BY JUSTICE STUMBO

Respectfully, and with some reluctance, I must dissent. I agree with the majority opinion's excellent analysis as to the constitutionality of taxing those involved in health care as a class for the purpose of obtaining federal funding to support Kentucky Medicaid. It is the disparate treatment of the subclasses by House Bill 1 that I find unacceptable.

House Bill 1 (codified as KRS 142.201-142.259 and KRS 216.270-216.287) sets up three classes of health care providers which are taxed at different rates, and one of which is permitted to "pass on" to the recipient of the taxable item or service the tax imposed. Hospitals are taxed at a rate of 2 1/2 percent of gross revenues. KRS 142.202. Health care providers other than hospitals (e.g., physicians, health maintenance organizations, nursing homes for the mentally retarded, and others) are taxed at the rate of 2 percent of the gross revenues. KRS 142.207. Pharmacies and others dispensing out-patient prescription drugs are taxed at the rate of 25 cents per prescription. KRS 142.211. Of this last class, only pharmacies are permitted to pass the tax on to insurers, health maintenance organizations, and non-profit hospital and health service corporations. KRS 142.211 (1)(a).

Physicians can, and do, dispense out-patient prescriptions, yet they are forbidden to pass on the 25 cent tax that pharmacies are permitted to pass on. KRS 142.213 (1). Additionally, pharmacies are permitted to pass on the same tax to a provider, as defined by KRS 142.207, already subject to taxation; that is, a health maintenance organization which in turn is forbidden to pass on the tax. The result is that a health maintenance organization pays both the 2 percent tax on its gross income and the 25 cent per prescription tax passed through it by the pharmacies. Thus, two members of the same subclass are treated differently. These differences compel me to conclude that these subclassifications are unreasonable and arbitrary in that the members of the subclasses are not treated equally. *Schoo* v. *Rose,* Ky., 270 S.W.2d 940 (1954).

WINTERSHEIMER, J., joins in this dissent.

RENDERED: MARCH 24, 1994
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

93-SC-946-TG

COMMONWEALTH OF KENTUCKY, REVENUE CABINET; KIM BURSE, in her official capacity as Secretary; KENTUCKY REVENUE CABINET; COMMONWEALTH OF KENTUCKY, CABINET FOR HUMAN RESOURCES; FONTAINE BANKS, JR., in his official capacity as Secretary; KENTUCKY CABINET FOR HUMAN RESOURCES; KENTUCKY HEALTH CARE DATE[sic] COMMISSION - - - - - - - - - - *Appellants*

v.

CHARLES C. SMITH, JR., M.D.; FRED L. BARNETT, M.D.; WILLIAM B. MONNIG, M.D.; KENTUCKY MEDICAL ASSOCIATION; STUART G. YEOMAN, M.D.; TIM HULSEY, M.D.; JOE DAVIS, M.D., President, Warren County Medical Society; JOSEPH JANES - - - - - - - - - - *Appellees*

On Transfer From Court of Appeals
No. 93-CA-002840
(Franklin Circuit Court No. 93-CI-000959)

OPINION BY JUSTICE WINTERSHEIMER CONCURRING IN PART AND DISSENTING IN PART

I concur with the parts of the Majority Opinion which apparently endorse the legislative philosophy of dedication of tax funds to a particular perceived need. I also concur with the concept of deference to the General Assembly in matters of taxation in general. I further concur with the analysis of the Fourteenth Amendment and Sections 1, 2 and 3 of the Kentucky Constitution. However, I must

respectfully dissent from those aspects of the Opinion which deal with the application of constitutional principles to the specific facts of this case in regard to the subclassification of physicians.

As I noted in my concurring opinion in *Gillis* v. *Yount*, Ky., 748 S.W.2d 357 (1988), the question becomes whether it was arbitrary and unreasonable for the legislature to create a separate subclassification in this case. The problem centers on the classification of those 60 percent of the physicians who participate in Medicaid as contrasted with those 40 percent of physicians who do not participate in the program in any way. One of the greatest dangers to thoughtful analysis in any case involving taxation and the relationship between the judiciary and the legislature or executive is a generalization. Each case must be carefully examined on its own merit.

Here the principal problem relates to a benefit/burden test which produces an arbitrary tax on those 40 percent of the physicians who do not participate in the program. Such a situation is more than unfair or unequal—it is arbitrary. It is understood that this analysis already accepts the segregation of physicians from general taxpayers into a class of their own. Classification by the legislature should be affirmed except as here where there is no rational basis and the legislation is arbitrary. *Delta Air Lines, Inc.* v. *Commonwealth, Revenue Cabinet*, Ky., 689 S.W.2d 14 (1985).

Any extension of the benefits/burdens test can lead to further assignment of tax revenue from all contractors, engineers and architects who could possibly benefit from providing construction work on the state's highways. The same limited application of taxation and the revenues produced thereby could be applied to lawyers for the benefit of the justice system. The list of potential classifications is endless. The problem with disparate treatment of members of a subclass is that it singles out those who do not participate in a particular program as having derived a benefit therefrom. It is impossible to distinguish the ben-

efit the nonparticipating physicians have in funding Medicaid from that of the general population.

The classification is invalid as it applies to 40 percent of the physicians who do not participate in Medicaid. *Cf. Board of Education of Jefferson Co.* v. *Board of Education of Louisville,* Ky., 472 S.W.2d 496 (1971).

In this legislation, the classification created is both too narrow and too broad. It is too narrow because it does not include as taxpayers other people who receive payment for services to Medicaid patients such as chiropractors, dentists, nurses, mid-wives and transportation providers. It has always been the law that it is essential to the constitutionality of taxation that it apply equally to all persons in a given class. A tax which discriminates between different members of a class or subclass should be considered void. *Denton* v. *Porter,* 284 Ky. 114, 143 S.W.2d 1056 (1940).

The legislation does not apply equally to all who are nonphysicians who have been included in the class. There is a difference in tax rates because physicians are taxed at 2 percent of gross; hospitals are taxed at 2-1/2 percent of gross; and pharmacies are taxed at 25 cents per prescription. In addition, physicians who prescribe medicine are prohibited from passing on the tax to their patients while pharmacies are allowed to pass on their provider tax to third party payers. Kentucky has long prohibited disparate treatment of persons selling medicine as a violation of the Kentucky Constitution Section 59. *Commonwealth* v. *Payne Medicine Co.,* 138 Ky. 164, 127 S.W. 760 (1910).

Taxing only certain healthcare providers to fund Medicaid is as flawed as would be a system which would tax only school teachers to pay for new educational facilities or taxing only licensed psychologists to pay for public mental health care facilities, or taxing only policemen to pay for victim compensation programs. *Cf. Coy* v. *Florida Birth-Related Neurological Injury Compensation Plan,* Fla., 595 So.2d 943, Kogan J. dissenting, *cert. denied, McGibony* v. *Florida Birth-Related Neurological Injury Compensation Plan,* ___ U.S, ___, 113 S.Ct. 194, 121 L.Ed.2d 137 (1992).

An extension of this idea would perhaps include a tax on grocery store operators on gross receipts to maintain a food stamp program.

The class is too broad because not every physician receives payment from Medicaid. In order for a classification to be constitutional, it must be framed as to be exclusively applicable to the person or things sought to be embraced therein. *Priest* v. *State Tax Commission,* 258 Ky. 391, 80 S.W.2d 43 (1935). It is clearly a gratuitous oversimplification of the law to announce that all physicians somehow benefit from Medicaid payments. If legislation is so broad in its scope as to embrace objects not naturally belonging therein, it does not pass the test under Section 59 of the Kentucky Constitution. *Safety Building & Loan Co.* v. *Ecklar,* 106 Ky. 115, 50 S.W. 50 (1899). A more constitutionally valid system might tax physicians who receive payments for services to Medicaid patients.

Physicians are not the direct or intended beneficiaries of Medicaid programs, the indigent patients are. Participating physicians and other healthcare providers are compensated for their services rendered and therefore receive indirect benefits. A number of shortcomings brings the constitutionality of the legislation into question. The problems include the question of equal protection and arbitrary legislation, the issue of the title not indicating that the bill involves a tax but rather revenue and finance, and veto arguments. The Majority Opinion has properly decided these issues.

The Franklin Circuit Court reasoned correctly that the imposition of a tax on certain physicians was a violation of Section 59 of the Kentucky Constitution which prohibits special legislation. The tax was not limited to the 60 percent of the physicians who participated in the Medicaid program and by assumption benefited thereby, but applied to all physicians rendering health care services in the State. I believe it was incorrectly assumed that an increase in funding was an indirect benefit to those doctors who did not participate.

Although we can only decide the case before us, I do not believe this Court should ignore the fact that there are a number of other cases involving state taxation. The public press reports that the Revenue Cabinet is now involved in 11 major lawsuits. It is not difficult to understand why the taxpayers are very concerned in a society in which ordinary working people will pay in excess of 40 percent of their gross income in taxation. As noted by the Majority Opinion, the question of taxation is a peculiarly legislative function of government. The only role of the court is to review a specific tax on the grounds of arbitrariness or improper classification. Each case must be reviewed on a case-by-case approach.

This Court decided *Commonwealth of Kentucky, Revenue Cabinet* v. *Cope* on January 31, 1994, to the effect that a legislative grant of exemption was a legitimate classification between private and government pension plans. There is a difference between the imposition of taxes and the grant of an exemption from taxes. It was possibly a shortcoming that the *Cope, supra,* decision did not make it clear that the legislature could exempt all pensions, both private and governmental as one of the options to which the court deferred. The legislature still has that option.

"The power to tax involves the power to destroy" noted Chief Justice John Marshall in *McCulloch* v. *Maryland,* 17 U.S. 159 (4 Wheat. 316), 4 L.Ed. 579 (1819). The duty of the judiciary is to distinguish between constitutional error and proper deference to the legislature. Unequal treatment really should not be acceptable although it is seemingly approved by the Majority Opinion.

There may be many different views as to how to apply the same standards. The responsibility for fashioning fair tax laws is that of the General Assembly. It cannot be delegated and it cannot be assumed by any other branch of government.

STUMBO, J., joins in this opinion.

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I

Civil Action Nos. 93-CI-00959
93-CI-01275

CHARLES C. SMITH, Et Al. - - - - - - *Plaintiffs*

v.

COMMONWEALTH OF KENTUCKY, REVENUE CABINET, Et Al. - - - - - - - - - - - *Defendants*

AND

HEALTH MAINTENANCE ORGANIZATION ASSOCIATION OF KENTUCKY, INC., Et Al. - - - - - *Plaintiffs*

v.

COMMONWEALTH OF KENTUCKY, REVENUE CABINET, Et Al. - - - - - - - - - - - *Defendants*

ORDER—Entered November 23, 1993

I. STATEMENT OF THE CASE

This action is a consolidation of three separately filed cases. *Charles C. Smith, Jr., M.D., et al.*, v. *Commonwealth of Kentucky Department of Revenue, et al.*, 93-CI-0959, was filed July 2, 1993. *Stewart G. Yeoman, M.D., et al.* v. *Commonwealth of Kentucky Department of Revenue et al.*, 93-CI-01097, was filed July 23, 1993. *Yeoman* was consolidated into *Smith* by Order of the Franklin Circuit Court dated September 2, 1993. *Health Maintenance Organization Association of Kentucky, et al.* v. *Commonwealth of Kentucky Department of Revenue et al.* was filed August 19, 1993. On September 2, 1993, this case was consolidated with *Smith* for purposes of briefing schedules and oral argument.

The Plaintiffs in these consolidated cases are Dr. Fred L. Barnett, Dr. Joe Davis, Dr. Tim Hulsey, Dr. William B. Monning, Dr. Charles C. Smith, Jr., Dr. Stewart G. Yeoman, the Kentucky Medical Association, the Health Maintenance Organization Association of Kentucky, and nine health maintenance organizations ("HMO's") operating in Kentucky.

Each physician Plaintiff is licensed to practice medicine in the Commonwealth of Kentucky and each of them except Dr. Barnett participates in the state Medicaid program. Dr. Barnett does not participate in Medicaid but accepts indigent patients as a regular part of his practice.

The Kentucky Medical Association is a nonprofit Kentucky corporation representing approximately 4,000 physicians. The Health Maintenance Organization Association of Kentucky is a nonprofit corporation organized to promote the business interests of its members, health maintenance corporations authorized pursuant to Chapter 304, Subtitle 38 of the Kentucky Revised Statutes.

The Defendants are the Kentucky Revenue Cabinet ("the Revenue Cabinet") and its Secretary Kim Burse, the Kentucky Cabinet for Human Resources ("CHR") and its Secretary Fontaine Banks, and the Kentucky Health Care Data Commission ("the Commission"). The Commission is an administrative agency established by House Bill 1, Section 22, passed by the Second Extraordinary Session of the General Assembly, 1993. The Commission is authorized to investigate, audit, and analyze data concerning Kentucky's health care providers.

At issue in this consolidated action are taxes on health care providers imposed by House Bill 1 which was enacted in response to the Medicaid Voluntary Contribution and Provider Specific Tax Amendments of 1991. (Pub. L. 102-234). These amendments restricted federal financial participation ("FFP") in Medicaid programs in states whose programs were partially funded by "impermissible health care related taxes." The 1991 Amendments invalidated

the provider tax then in effect in Kentucky. The Kentucky tax was an impermissible health care related tax because it: (1) was only assessed against providers who participated in the Medicaid program; (2) included a hold harmless provision; and (3) taxed different providers at different rates depending on their Medicaid receipts. Each of these provisions violated the federal amendments of 1991.

House Bill 1 established provider taxes that would comply with the strictures set out in the 1991 Federal Amendments and maximize the state's eligibility for federal matching funds. The bill taxed several categories of health care providers. Section 2 established a 2.5 percent tax on hospitals' gross revenues. Section 3(1) imposed a 2 percent tax on the gross revenues of physicians, a tax applicable to all physicians regardless of whether they participated in the Medicaid program. Section 4(1) established a 25 cent tax on each prescription and Section 4(1)(a) permitted this tax to be passed along to insurers, HMO's, and other health service corporations. Section 5(1), on the other hand, prohibited hospitals and physicians from passing on the tax imposed on them. Section 20 provided for funding the disproportionate share program.

A Senate Amendment to House Bill 1 established the Health Care Data Commission. Sections 22 to 30. Section 29 of the Senate's amendment made cooperation with the Commission a condition of licensure in the state.

The Governor vetoed a portion of House Bill 1 and there was no legislative review of the bill after that veto.

1. GROUNDS FOR RELIEF, *SMITH*

The Plaintiffs in *Smith* request Summary Judgment declaring House Bill 1 and all of its provisions void, unconstitutional and unenforceable. They further request a Permanent Injunction against Secretaries Burse and Banks from enforcing and implementing the provisions of the bill.

The Plaintiffs request this relief on constitutional grounds. They claim that House Bill 1 violates their right to due process guaranteed by the United States and Ken-

tucky Constitutions. In support of this claim, Plaintiffs argue that there is no rational basis to tax physicians more than the general public to fund a program such as Medicaid which benefits society as a whole. They also claim that the bill's prohibition against passing through the tax violates their due process rights to charge their patients in a manner and amount they deem appropriate.

The Plaintiffs challenge the bill on equal protection grounds. They claim House Bill 1 sets up unreasonable, arbitrary, and unfair classifications that are not substantially related to the purposes of the legislation. Plaintiffs also claim that all people similarly situated are not treated alike. They maintain that the legislation is too broad because it covers all physicians regardless of participation in the Medicaid program and they claim that it is too narrow because it does not cover all health care professionals who do participate in Medicaid.

The Plaintiffs contend that House Bill 1 violates Section 59 of the Kentucky Constitution which prohibits indiscriminate legislative classifications. They suggest that placing an unequal burden on them is a politically motivated and punitive action, something Section 59 is designed to protect Kentucky citizens against.

The Plaintiffs suggest that the Governor's partial veto after the legislature adjourned invalidates the bill in its entirety. According to the Plaintiffs, such a veto violates Section 88 of the Kentucky Constitution.

The Plaintiffs suggest that House Bill 1 violates Section 51 of the Kentucky Constitution which requires the title of an act to give fair and reasonable notice of its contents and requires that a bill relate to no more than one subject. The Plaintiffs claim that the bill's title, "An Act relating to health care and safety, providing for revenues to finance health care, making appropriations, and declaring an emergency," violated Section 51, because the title failed to mention the provider tax. The bill also violated Section 51, according to the Plaintiffs, because it

dealt with more than one subject, financing and the establishment of the Commission.

The Plaintiffs also claim that the Senate amendment violated Section 47 of the Kentucky Constitution, which requires revenue bills to originate in the House. Section 47 permits the Senate to amend revenue bills but nothing unrelated to raising revenue may be introduced. The provision for the Health Care Data Commission, according to the Plaintiffs, constituted a new matter, unrelated to raising revenue.

The Plaintiffs also object to House Bill 1 because it creates, in the Commission a powerful, independent state agency, not answerable to any of the three branches of government. Therefore, the Plaintiffs claim, the establishment of that agency is a violation of separation of powers.

The Plaintiffs object to Section 17 of House Bill 1 because it provides that the Revenue Cabinet may require providers to post a bond in an amount to be determined by the Cabinet. The Plaintiffs claim that this is an unconstitutional delegation of power to the Cabinet which violates Sections 29 and 60 of the Kentucky Constitutions.

The Plaintiffs maintain that Sections 6, 8, and 16 of House Bill No. 1 amount to an unconstitutional delegation of the state's power to tax in violation of Sections 27, 28, 29, 42, 47, and 60 of the Kentucky Constitution. These sections of the bill give the Revenue Cabinet discretion to raise and lower provider taxes and to expand the list of services subject to the tax, as federal law permits. Section 16 requires providers to remit taxes directly to the Revenue Cabinet on a monthly basis, and requires the Revenue Cabinet to notify providers of any rate change.

The Plaintiffs object to Section 26 of House Bill 1, allowing the Commission to enter providers' premises and conduct independent audits. According to the Plaintiffs, this Section permits unbridled agency discretion in investigating physicians' medical offices. Such unlimited discretion violates the Fourth Amendment to the United States

Constitution and Section 10 of the Kentucky Constitution, according to the Plaintiffs.

The Plaintiffs also object to Sections 23 through 29 because they require providers to furnish patient records and information to the Commission in violation of the right to privacy guaranteed by the United States and Kentucky Constitutions.

2. GROUNDS FOR RELIEF, *HEALTH MAINTENANCE ORGANIZATION ASSOCIATION OF KENTUCKY, ET AL.*

The Health Care Maintenance Organization Association of Kentucky, Inc., et al. requests temporary and injunctive relief from implementing or enforcing House Bill No. 1 against the Plaintiff HMO's, a declaration of rights that House Bill 1 is null, void and unenforceable in violation of the United States and Kentucky Constitutions, restitution of taxes paid pursuant to House Bill 1, and attorney fees and costs.

The Plaintiff HMO's assert the same constitutional grounds in opposition to House Bill 1 as do the *Smith* Plaintiffs but make additional arguments.

The HMO's claim that House Bill 1 does not tax HMO premiums paid by members to insure coverage. They maintain that the language of the bill itself and the intent of the Legislature prove this claim. The word "premiums" is not used in the bill and the bill is limited to taxes on gross revenues received "for the provision of health care items or services." HMO's are not "providers" in the sense intended by House Bill 1 but are third party payers, according to the Plaintiffs.

The Plaintiffs claim that HMO premiums may not be taxed under federal law. House Bill 1 provides for "permissible health-care related taxes" and federal regulations only permit taxes on HMO services, not premiums.

The Plaintiffs claim that HMO's are not eligible to participate in Medicaid in Kentucky and are therefore ex-

cluded from taxation under House Bill 1. Kentucky law requires CHR to determine what groups may participate in Medicaid and CHR regulations require that an HMO have a contract with CHR in order to provide Medicaid services. There is no contract between any HMO and CHR to provide such services. While it is potentially possible for HMO's to participate in the state's Medicaid program, that is not the case now and, therefore, HMO's may not be taxed under House Bill 1.

The Plaintiffs also maintain that federal law preempts House Bill 1 because it relates to group health plans and seeks to impose a tax on a payment made for federal employee health plans. According to the Plaintiffs, the Employee Retirement Income Security Act ("ERISA") preempts all state laws relating to any employee benefit plan. House Bill 1 will change the price, quality, and character of ERISA plans HMO's offer. Because of this, House Bill 1 is preempted by ERISA. The Federal Employee Health Benefit Act ("FEHBA") also preempts House Bill 1 because, according to the Plaintiffs, the bill seeks to impose a tax on a federal employee health plan.

3. DEFENDANT'S RESPONSE TO PLAINTIFF'S CLAIMS

The Defendants request that the Court grant their Motion for Summary Judgment and hold House Bill No. 1 constitutional.

The Defendants assert several grounds in support of their Motion. They claim that House Bill No. 1 does not violate due process or equal protection under the United States or Kentucky constitutions. They maintain that the state has broad authority to establish classifications for the purpose of taxation. The Defendants deny that House Bill No. 1 is special legislation, prohibited by Section 59 because legislative classifications with rational basis do not constitute special legislation. Defendants also claim that voluntary compliance with a federal statutory scheme has been found to be general legislation. *Wagoner* v. *Wagoner,* Ky., 846 S.W.2d 704 (1993). They maintain that the

Governor properly exercised the line item veto because House Bill No. 1 is an appropriations bill and the Governor is authorized to make line item vetoes in such bills. Even in cases where a veto is improperly exercised, the bill in question becomes law with the vetoed portion intact, according to the Defendants.

The Defendants also maintain that Section 51 of the Kentucky Constitution, pertaining to the title and contents of bills, has not been violated. The Defendants point out that this Section has always been liberally construed with doubts as to compliance resolved in favor of the legislative act. They also maintain the Section 47 has not been violated because the Senate amendment creating the Health Care Data Commission was intricately related to the remainder of the bill. Data collection such as that provided for by the amendment is vital to the proper administration of indigent care.

The Defendants also maintain that principles of separation of powers have not been violated by House Bill 1. The disputed bond requirement is an administrative compliance tool. The creation of Health Care Data Commission itself is not a violation of separation of powers because, while it is an independent agency, it is clearly an executive branch agency.

The Defendants argue that the collection of data by the Commission will not violate the privacy rights of physicians or patients. Data collected will involve cost, quality, and outcome and the confidentiality of medical records will not be compromised.

In regard to the specific assertions of the HMO Plaintiffs, Defendants claim that the plain language of the bill permits taxation of HMO premiums and HMO's are not prohibited by state law from participating in Medicaid. They also maintain that ERISA and FEHBA do not preempt House Bill No. 1.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

There being no issue of material fact in dispute, all parties have moved for Summary Judgment pursuant to Civil Rule 56 and *Steelvest* v. *Scansteel Service Center, Inc.*, Ky., 807 S.W.2d 476 (1991).

The Governor's veto of a portion of House Bill 1, Section 20, was a proper exercise of the line item veto provided for in Section 88 of the Kentucky Constitution. That Section provides that "[t]he Governor shall have the power to disapprove any part or parts of appropriation bills embracing distinct items. . . ." Ky. Const. Section 88. House Bill 1 is an appropriation act as defined in KRS 48.010(4): "any act of the general assembly that authorizes the expenditure of public funds. . . ." House Bill 1 clearly authorizes the expenditure of public funds. House Bill 1, Section 20, for example, establishes and allocates revenue to the MART and MAIT funds. The Governor's veto was in compliance with Section 88 and, therefore, does not invalidate House Bill 1.

House Bill 1 does not violate the provision of Section 51 of the Kentucky Constitution which requires that the subject matter of a bill be reflected in its title. Therefore, House Bill 1 cannot be invalidated on that ground.

House Bill 1 was amended by the Senate to establish the Health Care Data Commission ("the Commission"). (House Bill 1, Sections 22-29.) The Plaintiffs claim that this amendment is invalid under Kentucky Constitution because it violates: (1) the separation of powers provisions of Sections 27 and 29 by creating an independent agency; (2) Section 47 because the amendment is unrelated to raising revenue; and (3) Section 51 because the amendment causes the bill to relate to more that one subject and the title does not reflect the Commission's establishment.

The Court is not convinced by Plaintiff's argument that the Commission is an independent agency. The Sections of House Bill 1 establishing the Commission refer to it as "an independent agency of state government" (House Bill

1, Section 23(1)) but the Commission is, in fact, an executive branch agency. It is required by statute to coordinate its activities with other executive agencies, (House Bill 1, Section 24(3)), it is administratively attached to the Cabinet for Human Resources, (House Bill 1 Section 23(1)), and its members are appointed by the Governor and may be removed by him for cause, (House Bill 1, Section 23(2)). For these reasons, the Court finds that the Health Care Data Commission is an executive agency and not an independent agency. Therefore, Sections 27 and 28 of the Kentucky Constitution are not violated by House Bill 1, Sections 22-29.

That portion of House Bill 1 that establishes the Commission does violate Section 47 of the Kentucky Constitution. Section 47 requires revenue bills to originate in the House and permits the Senate to amend such bills only if, "no new matter . . . [is] introduced, under color of amendment, which does not relate to raising revenue." Ky. Const. Section 47. The Commission's purpose is to collect data on health services in Kentucky. This purpose is not limited to services funded by Medicaid but includes data collection on all health services. (House Bill 1, Section 23.)

In *Farris* v. *Shoppers Village Liquors, Inc.*, Ky., 669 S.W.2d 213, 213-214 (1984), the Kentucky Supreme Court decided a similar issue. In *Farris*, the Court considered a bill passed by the 1982 session of the General Assembly, "An Act Relating to Revenue and Taxation." This legislation established a 9 percent tax on the wholesale distribution of liquor and repealed a tax on the retail sale of liquor. A Senate amendment to the act established procedures for the sale and delivery of alcohol, specifying the information that must be recorded on invoices and requirements regarding the place of delivery. In *Farris*, the Supreme Court held that the Senate amendment did not relate to the subject matter of revenue and taxation and, therefore, violated Section 47 of the Kentucky Constitution.

The Senate amendment in this case is similarly unrelated to revenue and taxation. The Commission's authority to gather information applies to all health services performed in the state, not just Medicaid services. The Commission is authorized to collect data not only on cost but also on the "quality, and outcomes of health services." (House Bill 1, Section 23(1)). The Commission's mandate is as distinct from raising revenue as is the amendment in *Farris* setting out the data elements required for liquor invoices. The Commission's prescribed duties do not relate to raising revenue but to monitoring the medical treatment of every citizen in the state of Kentucky. Therefore, the Court finds that Sections 22-29 of House Bill 1 violate Section 47 of the Kentucky Constitution.

The two percent tax on physicians' gross revenues provided for in House Bill 1, Section 3 violates Section 59 of the Kentucky Constitution which prohibits special legislation. Section 59 provides, in pertinent part:

> The General Assembly shall not pass local or special acts concerning any of the following subjects, or for any of the following purposes, namely:
>
> . . . .
>
> Fifteenth: To authorize or to regulate the levy, the assessment or the collection of taxes, or to give any indulgence or discharge to any assessor or collector of taxes, or to his sureties.

The purpose of Section 59 is illuminated in *City of Louisville* v. *Kuntz*, Ky., 47 S.W. 592 (1898). In *Kuntz* at 593, the Court of Appeals described Section 59 as "a safeguard . . . for the protection of the weak as well as the strong" which prohibited "the legislature from discriminating in favor of or against individuals or classes." Special legislation is defined in *Board of Education of Jefferson County* v. *Board of Education of Louisville*, Ky., 472 S.W.2d 496, 498 (1971) as "legislation which arbitrarily or beyond reasonable justification discriminates against some persons or objects and favors others." In *Kling* v. *Geary*, Ky., 667 S.W.2d 379, 382 (1984), the Supreme Court held that there

is no special legislation "[w]here the legislature establishes a classification made upon a reasonable and natural distinction which relates logically to the purpose of the Act."

House Bill 1, Section 3 is not limited to the 60 percent of physicians participating in the Medicaid program but applies to the gross revenues of all physicians practicing medicine in Kentucky. This section constitutes special legislation, prohibited by Section 59 of the Kentucky Constitution. The classifications established in the Act are not based upon reasonable and natural distinctions and are not logically related to the purposes of the legislation. There is no reasonable basis to single out these health care providers to pay special taxes to support the Medicaid program. This program benefits the state's residents as a whole and there are no justifiable reasons for arbitrarily designating physicians to pay for it. Section 59 was designed to restrict the legislature from favoring or disfavoring particular groups, however advantageous it may be to do so. The increase in funding and the indirect benefit to 60 percent of physicians who participate in providing services for the program do not support a rationale for overcoming the proscriptions of Section 59 of the Kentucky Constitution. The classifications set up in House Bill 1 are not logically related to the purpose of the Act, which is to increase funding for the Medicaid program.

The Commonwealth is not simply complying with a mandated federal statutory scheme, but is rewriting the law to avoid loss of some federal funding. The Federal government does *not* require that providers be taxed but sets specific guidelines and limitations for states that decide to do so. Federal permission does not provide sufficient rationale to overcome Section 59 of the Kentucky Constitution.

Therefore the tax on the gross revenues of all physicians practicing in Kentucky is invalid. The same reasoning applies to physicians employed by HMO's. The salaries of physicians employed by HMO's may not be taxed under House Bill 1.

In light of this Court's determination that the tax on physicians violates Section 59 of the Kentucky Constitution, it is not necessary to address the issues of due process and equal protection.

HMO premiums may not be taxed under House Bill 1. The legislative history of House Bill 1 shows that the General Assembly never intended that HMO premiums be taxed. Prior to the bill's approval, Representative Billy Ray Smith proposed an amendment declaring that HMO premiums were not subject to the taxes imposed therein. In its Summary of Floor Amendments to the Second Committee Substitute to House Bill 1, the Legislative Research Commission noted that Smith's amendment was, "probably not necessary since it is fairly clear that HMO premiums would not be subject to the tax." (Summary of Floor Amendments, at 5.) In floor debates, Representative Ernesto Scorsone claimed that Smith's amendment was not needed. Representative Scorsone said, "[I]t's pretty clear that the only thing we are taxing are services. That's the only thing we can tax . . . so the HMO fee would not be taxed under this law." (Transcript of House Floor Debate of May 21, 1993.) Representative Smith withdrew his amendment after this statement. It is clear that the legislative intent was not to include HMO premiums among the provider taxes established in House Bill 1.

The provisions of House Bill 1 establishing the Health Care Data Commission and taxing physicians are unconstitutional. The General Assembly never intended that HMO's be taxed.

THEREFORE, it is the JUDGMENT of this Court that: (1) the Commission on Health Care Data Collection is ENJOINED from taking any action; (2) Plaintiffs' Motion requesting a Permanent Injunction enjoining the Revenue Cabinet from any further collection of taxes from plaintiff physicians or HMO's is GRANTED; and (3) the Revenue Cabinet is ORDERED to remit refunds on taxes already paid by plaintiff physicians and HMO's within 90 days of this Order.

So ORDERED this 23rd day of November, 1993.

There being no just reason for delay, this is a final and appealable JUDGMENT.

/s/ Roger L. Crittenden
Roger L. Crittenden
Judge, Franklin Circuit Court

SUPREME COURT OF KENTUCKY

93-SC-946-TG

COMMONWEALTH OF KENTUCKY
REVENUE CABINET, Et Al - - - - - *Appellants*

v.

CHARLES C. SMITH, JR., M.D., Et Al - - - *Appellees*

On Review From the Court of Appeals
93-CA-2840-TI
(Franklin Circuit Court No. 93-CI-0959)

ORDER DENYING PETITION FOR REHEARING

AND

ORDER DENYING MOTION FOR ORAL ARGUMENT

Appellees petition for rehearing and appellees motion for oral argument in the above-styled appeal are denied.

Stephens, C. J., and Reynolds and Wintersheimer, JJ., concur. Special Justices Stephen C. Cawood, Ben S. Fletcher III and R. Kent Westberry concur.

ENTERED: June 23, 1994.

/s/ Robert F. Stephens
Chief Justice

Supreme Court, U.S.
FILED
NOV 4 1994
OFFICE OF THE CLERK

No. 94-525

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

CHARLES C. SMITH, JR., et al. - - Petitioners,

versus

COMMONWEALTH OF KENTUCKY,
REVENUE CABINET, et al. - - - Respondents.

Petition for a Writ of Certiorari
to the Supreme Court of Kentucky

PETITIONERS' REPLY BRIEF IN SUPPORT

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No. 94-525

IN THE

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CHARLES C. SMITH, JR., M.D., et al. - - - *Petitioners*

v.

COMMONWEALTH OF KENTUCKY,
REVENUE CABINET, et al. - - - - *Respondents*

PETITIONS' REPLY BRIEF IN SUPPORT

The Petitioners, Charles C. Smith, Jr., M.D., Fred L. Barnett, M.D., William B. Monnig, M.D., and the Kentucky Medical Association, submit this Reply Brief in Support of their Petition for Writ of Certiorari.

I. THE DUBIOUS APPOINTMENT OF SPECIAL JUSTICES TO THE KENTUCKY SUPREME COURT MERITS REVIEW BY THIS COURT.

The Respondents have failed to present any rationale for this Court to decline review of the Kentucky constitutional procedure employed by Kentucky's Governor to appoint three special justices to the Kentucky Supreme Court. The Respondents' basic argument is (1) Governor Jones did what he was constitutionally obligated to do; and (2) the Petitioners have not proven any actual bias by the three justices appointed. This position is hollow, indeed,

and does not address the essence of the due process claim raised by the Petitioners; namely, that the appearance of a substantial conflict of interest in the appointment process violated their right to due process.

The Petitioners recognize that Governor Jones followed the letter of Kentucky Constitution § 110(3) in appointing the three special justices. This is not the issue. The issue is whether, under the extreme facts and circumstances of this case, Section 110(3) *as applied by Governor Jones*, violated the Petitioners' federally protected due process rights! In their Response, the Respondents fail to even mention, much less address, the "appearance" standard set forth by this Court in *In Re Murchison*, 349 U.S. 133, 136 (1955):

> This Court has said, however, that "Every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true . . . denies . . . due process of law." Tumey v. State of Ohio, 273 U.S. 510-, 532, 47 S.Ct. 437, 444, 71 L.Ed. 749. Such a stringent rule may sometimes bar trial judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.'" Offutt v. United States, 348 U.S. 11, 14, 75 S.Ct. 1, 113.

See also, Marshall v. *Jerrico*, 446 U.S. 238, (1989) which held that an impartial tribunal "preserves both the appearance and reality of fairness." Certainly it would be perverse for this Court to impose an "appearance" standard for a trial court, where relief from any prejudice may be obtained *via* appeal, and to disavow such a standard for the state's highest court, where no judicial review is available.

The principal case cited by the Respondents, *Liteky* v. *United States*, ___ U.S. ___, 114 S.Ct. 1147 (1994), is not

apropos. There, a federal trial judge was asked to disqualify himself because of a series of rulings and statements made in an earlier proceeding deemed by the defendant to be unfair and hostile. The motion was tested under 28 U.S.C. § 455(a), which requires judges to disqualify themselves if their impartiality might be questioned. In ruling against disqualification, this Court noted that all of the alleged acts of the judge were rulings or statements made in a judicial proceeding, and were not based upon an "extrajudicial source". ___ U.S. ___, 114 S.Ct. at 1157. The current Petition for Writ of Certiorari, though, is based precisely on an appearance of bias or prejudice caused by an "extrajudicial source" — namely, that Governor Jones' appointees would naturally favor the public position taken by the Governor, and the legal position taken by the Governor's Cabinets. Justice Kennedy's concurring opinion in *Liteky* (which was cited by the Respondents) does not challenge this position. To the contrary, the concurring opinion declares:

> For present purposes, it should suffice to say that § 455(a) is triggered by an attitude or state of mind so resistant to fair and dispassionate inquiry as to cause a party, the public, or a reviewing court to have grounds to question the neutral and objective character of a judge's rulings or findings.

Certainly in the case at issue here, the petitioners *and the public*[1] knew as soon as Governor Jones made the appointments that there were going to be at least three votes in favor of the constitutionality of House Bill 1. Given Governor Jones' public and personal interest in this litigation, would he ever appoint someone whose "state of mind" was not aligned with his own?

---

[1]Members of both the public and the press uniformly gave Petitioners bemused smirks when discussing the appointments.

The Respondents emphasize that the Petitioners have not shown actual bias or prejudice on the part of the three special justices. As an initial point, the Petitioners are not specifically challenging the decision of the three appointees not to recuse themselves; instead, the challenge is to the procedure that got the justices appointed in the first place. Moreover, as set forth in our Petition, *actual* bias or prejudice need not be shown.

The weakness of the Respondents' position can best be demonstrated by the circumstances of this case. After Governor Jones' initial three appointments, one appointee, Mr. Sheryl Snyder, recused himself. This recusal came only after it was publicly disclosed that a wholly owned subsidiary of Snyder's employer, I.C.H. Corporation, held a multi-million dollar contract with the state of Kentucky and is bidding on its retention. *See* Mr. Snyder's recusal letter included at page 23a of the Appendix to the Petition for Writ of Certiorari to the Supreme Court of the Commonwealth of Kentucky (No. 94-504) filed by a different group of petitioners in this case on September 16, 1994. Surely this fact was known to both Governor Jones and Mr. Snyder at the time of his appointment. Yet the appointment and acceptance occurred anyway. This circumstance illustrates more than the likelihood, but indeed demonstrates the certainty, that Governor Jones intended to place on the Supreme Court of Kentucky persons who would have a reason to vote with the Governor on the issue being litigated.

If this were not enough, the Respondents' position suggests that the Petitioners should have taken discovery from Governor Jones or the appointed state justices to determine if any actual bias existed. Yet how could the Petitioners take the deposition of Governor Jones to determine the factors that influenced his selection process? And how could the Petitioners serve interrogatories on the three

justices to determine their campaign contributions, their political alliances and aspirations, or whether they had discussed this case in any way with Governor Jones? The futility of this endeavor is precisely why actual bias need not be proven, but, instead, only the appearance of a conflict is enough to violate due process standards.

II. REVIEW SHOULD BE TAKEN BECAUSE THE KENTUCKY TAX ON MEDICAL PROVIDERS VIOLATES FEDERAL EQUAL PROTECTION STANDARDS

The Petitioners presented extensive reasons to this Court why review should be taken to determine whether Kentucky's special tax on physician's gross revenues to fund the Medicaid program violates federal equal protection standards. *See* pp. 17-22 of Petitioners' Petition for Writ of Certiorari. The Respondents' answer to the Petitioners' assertions is simply to bury their heads in the sand. Rather than even *mention* equal protection principles, the Respondents' argue that review should be denied because the Supreme Court decision "rests on the independent and adequate non-federal grounds of the Kentucky Constitution Section 59 and the state cases construing that section." Respondents' Brief at p. 9. This position reveals a complete misunderstanding of federal constitutional law. The standard relied upon by the Respondents' applies *only* when the application of a state law *avoids* a federal constitutional issue; here, the application of a state law *creates* the federal constitutional issue sought to be reviewed.

The Respondents' reliance upon *Michigan* v. *Long*, 463 U.S. 1032 (1983) is misplaced. There, the issue was whether the Michigan Supreme Court properly held evidence to be inadmissible in a criminal trial. The defendant argued to this Court that the ruling should not be reviewed because it was based on strict state evidentiary standards, rather

than upon federal constitutional principles. This Court held that the Michigan Supreme Court relied primarily on federal standards, and thus accepted jurisdiction. *See* 463 U.S. at 1043.

The principles set forth in *Michigan* have no bearing whatsoever on this case. The Kentucky Supreme Court did not make any state adjudication of the Petitioners' rights which would obviate the need to rule on their federal equal protection claims. Indeed, the Court specifically ruled on these federal claims. *See* Appendix p. 8a of Petitioners' Petition for Writ of Certiorari. Moreover, merely because a classification scheme might satisfy a state constitutional standard does not mean that federal constitutional standards have not been violated. This Court in *Michigan* declared:

> The jurisdictional concern is that we not "render an advisory opinion and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."

Id. at 1042 (quoting *Herb* v. *Pitcairn*, 324 U.S. 117, 125, 65 S. Ct. 459, 465, 89 L.Ed. 789 (1945)). Certainly a ruling in this case that the classification scheme created by House Bill 1 violated the Petitioners' right to equal protection under the Fourteenth Amendment to the United States Court could not be circumvented by a different ruling based on Kentucky state law.

The Petitioners have asserted legitimate arguments that their rights to equal protection have been violated - and the Respondents have completely ducked the issue. The Respondents' bizarre position manifests their inability to defend the Petitioners' claims, and is yet another reason to grant *certiorari* in this case.

CONCLUSION

For the foregoing reasons, as well as those presented in Petitioners' Petition for Writ of Certiorari, review of this case should be accepted by the Court.

Respectfully submitted,

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